STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

TAG IRA, LLC,

Plaintiff,

vs. Case No. 2014-659-CB

RESIDENTIAL GROUP 231, LLC, PROPERTY SOLUTIONS OF MICHIGAN, INC., ALLEN BOIKE, and STEVEN E. LONDEAU, JR.,

Defendants.

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OPINION AND ORDER

Plaintiff has filed a motion for summary disposition pursuant to MCR 2.116(C)(9) and (10). Defendants Property Solution of Michigan ("Defendant PSOM") and Allen Boike ("Defendant Boike") have filed a joint response and request that the motion be denied. In addition, Defendant Steven E. Londeau ("Defendant Londeau") has filed a response and requests that the motion be denied. Plaintiff has also filed a reply in support of its motion.

Facts and Procedural History

In early 2011, Defendant Boike, allegedly on behalf of Defendant PSOM, contacted Plaintiff's agent attempting to solicit an investment in a pool of securities that Defendant PSOM was seeking to purchase. Plaintiff declined the offer but agreed to extend a short term loan of $200,000.00 to enable the purchase.

On August 26, 2011, a promissory note was issued by Defendant Residential Group 231, LLC ("Defendant 231") in favor or Plaintiff in the amount of $200,000.00 ("First Note"). (*See*

Plaintiff's Exhibit 1.) None of the other Defendants are named in the First Note. (Id.) Defendant 231 ultimately defaulted on the terms of the First Note.

On February 21, 2012, Plaintiff sent a written notice of default to Defendant 231 and Defendant PSOM. On March 2, 2012, in order to stop collection efforts, a promissory note was executed between Defendant PSOM and Plaintiff, in which Defendants Boike and Londeau personally guaranteed the loan amount due and owing ("Second Note"). (*See* Plaintiff's Exhibit 2.) While two payments were made pursuant to the Second Note totaling $106,000.00, PSOM ultimately defaulted on the terms of the Second Note.

On or about March 11, 2013, Defendant Londeau emailed Plaintiff a "revised" promissory note in the amount of $165,000.00 ("Third Note")[1]. The Third Note purports to be between Plaintiff and Defendant 231. The Third Note does not contain any guaranties and does not include Defendant PSOM. Plaintiff acknowledges receiving the Third Note but the parties dispute whether the terms of Third Note were accepted.

Regardless of whether the Third Note was accepted, the parties agree that the terms of the Second and Third Notes were not satisfied, resulting in a default and this lawsuit.

On February 20, 2014, Plaintiff filed its complaint in this matter alleging claims for: breach of contract (Count I), breach of implied contract (Count II), quantum meruit (Count III), promissory estoppel (Count IV), fraud (Count V), and conversion (Count VI). On August 21, 2014, Plaintiff filed its instant motion for summary disposition. Defendants PSOM and Boike have filed a joint response. Defendant Londeau has filed an individual response. In addition, Plaintiff has filed a reply in support of its motion. On September 22, 2014, the Court held a hearing in connection with the motion and took the matter under advisement.

Standards of Review

A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings by accepting all well-pleaded allegations as true. *Id.* If the defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery, then summary disposition under this rule is proper. *Id.* Further, a court may look only to the parties' pleadings in deciding a motion under MCR 2.116(C)(9). *Id.*

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Graves v Warner Bros,* 253 Mich App 486, 491; 656 NW2d 195 (2002). Under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Id.* However, the nonmoving party must produce evidence showing a material dispute of fact left for trial in order to survive a motion for summary disposition under this rule. MCR 2.116(G)(4); *Village of Dimondale v Grable,* 240 Mich App 553, 566; 618 NW2d 23 (2000). Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Wayne County Bd of Com'rs v Wayne County Airport Authority,* 253 Mich App 144, 161; 658 NW2d 804 (2002).

Arguments and Analysis

In support of its motion, Plaintiff contends that it is entitled to summary disposition of its breach of contract, breach of implied contract and account stated claims because it is undisputed that the terms of Second Note were not satisfied.

In their response, Defendants PSOM, Londeau and Boike (collectively, "Defendants") contend that Plaintiff accepted the Third Note and that the Third Note replaced the Second Note.

[1] Defendant 231 sent an additional note prior to the Third Note, but the terms of the note were rejected by Plaintiff.

The First and Second Notes contain an identical provision governing modifications and amendments:

> No Modifications or Amendments; No Waiver. Except as specified herein, this Promissory Note may not be amended, modified or changed, nor shall any waiver of the provisions herein be effective, except only by an instrument in writing signed by the party against whom enforcement of any waiver, amendment, change, modification or discharge is sought. Additionally, a waiver of any provision in one event shall not be construed as a waiver of any other provision at any time, as a continuing waiver, or as a waiver of such provision on a subsequent event. (*See* Plaintiff's Exhibits A and E.)

In this case, Defendants contend that the Third Note took the place of the Second Note. However, it is undisputed that the Third Note was not signed by Plaintiff, i.e the party that Defendants seek to enforce the Third Note against. In addition to the Second Note's requirement that any amendment must be signed by the party against whom enforcement is sought, MCL 566.132 provides that any agreement in which an entity promises to pay for another's debts must be in writing and signed by the parties against whom enforcement is sought. In this matter, the Second Note satisfies the above-referenced law, as it is signed by Defendants. On the other hand, the Third Note fails to satisfy MCL 566.132 and the unambiguous terms of the Second Note. By executing the he Third Note, Defendant 231 purports to promise to pay for the Defendants obligations under the Second Note. However, the Third Note is not signed by Plaintiff, the party Defendants seek to enforce the Third Note against. Consequently, the Third Note may not be enforced against Plaintiff. Accordingly, Defendants' contention is without merit.

Defendant Boike also contends that he did not personally execute the Second Note. In support of his contention he relies on his own affidavit in which he testified that he did not personally sign the Second Note and that his signature is the result of a stamp that he did not authorize anyone to use in connection with the Second Note. (*See* April 4, 2014 Counter-

Affidavit of Allan Boike) In its reply, Plaintiff contends that Defendant Boike's forgery defense should be stricken pursuant to MCR 2.112(E)(1). MCR 2.112(E)(1) provides:

> (1) In an action on a written instrument, the execution of the instrument and the handwriting of the defendant are admitted unless the defendant specifically denies the execution or the handwriting and supports the denial with an affidavit filed with the answer. The court may, for good cause, extend the time for filing the affidavits.

In this case, Defendant Boike filed a counter-affidavit shortly after he filed his answer. In his affidavit he testified that he did not sign any agreement on which he could be liable to repay any funds to Plaintiff. Accordingly, Defendant Boike's defense complies with MCR 2.112(E)(1). While Plaintiff has cited to evidence that indicates that Defendant Boike did execute the Second Note, at best such evidence creates an issue of fact. Accordingly, Plaintiff's motion for summary disposition of its breach of contract claims against Defendant Boike must be denied.

With respect to Plaintiff's request for summary disposition of its account stated claim, an account stated does not apply in a situation were there is a claim that an express contract exists. *Thomasma v Carpenter*, 175 Mich 428, 434; 141 NW559 (1913); *Newmeyer v Frantz-Hager*, unpublished per curium opinion of the Court of Appeals, decided April 12, 2014, (Docket Number 313847). In this case there are express contracts between the parties in place in the form of promissory notes and guaranties. Consequently, Plaintiff's account stated claims must fail.

Conclusion

For the reasons discussed above, Plaintiff's motion for partial summary disposition is GRANTED, IN PART and DENIED, IN PART. Plaintiff's motion for summary disposition of its breach of contract claims against Defendants Property Solutions of Michigan, Inc. and Steven E. Londeau, Jr. is GRANTED. The remainder of Plaintiff's motion is DENIED. Further,

Plaintiff's claims for account stated are dismissed pursuant to MCR 2.116(I)(2). This Opinion and Order neither resolves the last claim nor closes the case. *See* MCR 2.602(A)(3).

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: October 3, 2014

JCF/sr

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